UNITED STATES
v.
VERDUGO & MILLER, INC.

IBLA 77-490 Decided October 20, 1978

Appeal from the decision of Administrative Law Judge Steiner holding that the Surprise lode mining claim, and the Surprise, Surprise No. 2, Uno Mas, and Lotta Dirt placer mining claims are null and void. Contest No. CA-154.

Affirmed.

1. Mining Claims: Determination of Validity--Mining Claims: Discovery: Marketability

   Material which is principally valuable for use as fill, sub-base, ballast, riprap or barrow, for which ordinary earth or rock may be used, is not locatable under the mining laws and was not locatable prior to July 23, 1955.

2. Mining Claims: Common Varieties of Minerals: Generally

   Common varieties of a particular mineral material do not have to be physically alike or equally desirable for a given purpose. When the evidence shows that other deposits occur commonly in the area and are similarly used, the fact that the subject deposit has qualities which are particularly well suited to that purpose does not, of itself, alter its essential character as a common variety material.

3. Mining Claims: Common Varieties of Minerals: Generally

Where, prior to July 23, 1955, a deposit of the common rock of the country might have been deemed locatable as building stone because it met certain engineering specifications or requirements, if this were unknown at that time, or if its only real value prior to that date was for ordinary fill, rip-rap, sub-base, ballast or barrow, it cannot be treated as a valuable mineral deposit which would serve to validate a mining claim.

4. Mining Claims: Common Varieties of Minerals: Generally

A deposit of what otherwise would be a common variety of mineral material cannot be regarded as uncommon on the basis that the deposit enjoys the simple economic advantage of closer proximity to the market.

5. Administrative Authority: Estoppel--Administrative Authority: Laches--Mining Claim: Contests

Where national forest land is open to mineral location, the failure of a district forest ranger to object to the location or development of mining claims for a number of years, or to request that a contest of the validity of the claims be initiated, does not estop the United States from bringing a contest, nor is the contest barred by laches.

APPEARANCES: Stephen C. Drummy, Esq., Newport Beach, California, for the appellant. Charles F. Lawrence, Esq., Office of the General Counsel, Department of Agriculture, San Francisco, California, for the appellee.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Verdugo & Miller, Inc., appeals from the July 11, 1977, decision of Administrative Law Judge Steiner, by which he held that five unpatented mining claims held by appellant are null and void.

The claims were located on various dates in 1955 prior to July 23 for granite rock. They are situated in the Cleveland National Forest, in Orange County, California.

We affirm Judge Steiner's decision and adopt it as the decision of this Board. Additionally, we will respond to the several contentions raised on appeal.

[1] The material on the claims consists of hard granite rock overlain by substantial quantities of decomposed granite. As noted in the decision below, the material was used as sub-base for paving a parking lot, rock for placement of a seawall, sub-base under concrete slabs, for riprap 1/ and revetments, backfill in ditches where pipe was laid, building up road shoulders, and other but similar purposes on a considerable number of jobs.

Certain products of the earth have never been regarded as subject to location under the mining law, despite the fact that they might be marketable at a profit. Among these nonlocatable materials are those used for fill, grade, ballast, and sub-base. United States v. Bienick, 14 IBLA 290; see also concurring opinion, 14 IBLA 297 (1974). From the evidence it is apparent that the chief value of the granitic rock from these claims was only for fill and related purposes, at least prior to July 23, 1955, when the mining law was amended to preclude the location of all common varieties of rock, even those which were valuable because they met specifications for building material. In sum, material which is principally valuable for use as fill, sub-base, ballast, riprap, or barrow was never locatable.

[2] Appellant contends that the Administrative Law Judge erred in holding that the granite rock is a common variety within the meaning of the Act of July 23, 1955, 30 U.S.C. § 611 (1976). It is argued that no testing was done by the Forest Service of the other occurrences of granite, which are widespread and abundant in the area, to prove that the other deposits have the same desirable characteristics as

---

1/ Pursuant to 43 CFR 4.24(b), we take official notice of the following definition from p. 929, A Dictionary of Mining, Mineral, and Related Terms (1968 ed.), published by this Department:

"riprap. a. A foundation or sustaining wall of stones thrown together without order. Webster 3d. b. Consists of heavy, irregular rock chunks used chiefly for river and harbor work, such as spillways at dams, shore protection, docks, and other similar construction that must resist the force of waves, tides, or strong currents. It is also used to fill in roadways and on embankments. BuMines Bull. 630, 1965 p. 886."

Even if this sort of rock could have been the subject of a valid location prior to July 23, 1955, appellant had no market for such prior to 1957 (Tr. 95).

that found on the subject claims. It is said that the hard granite at issue has greater density than that of competitors and thus has a higher specific gravity and is more durable. Also, it is asserted that the subject rock is angular in shape, rather then rounded. These attributes make its use more desirable for harbor projects, such as breakwaters and jetties.

First, we observe that while the Forest Service did not take the trouble to test all of the other granite exposures for miles around to disprove appellant's claim that these properties are unique, or rare, neither did appellant conduct such tests to prove that they are (Tr. 78, 79).

However, even had appellant succeeded in demonstrating that rock from these claims was better suited to this purpose, this would still not serve to elevate this otherwise common rock of the country to the status of an uncommon variety. The arguments advanced by appellant here are strikingly similar to those presented in United States v. Guzman, 18 IBLA 109, 81 I.D. 685 (1974). There it was alleged that the sand and gravel had unusual angularity and was less rounded than that of competitors because it had not been stream-washed as much. This, it was said, gave the material the capability for use in "high test" concrete. In holding that the use of material for construction purposes is only a common use, we said at 692:

> Common varieties of a particular mineral material do not have to be physically alike or equally desirable for a given purpose. For example, many kinds of common rock may be used to build a wall and, because their physical properties differ, certain kinds of common rock may be preferred for this purpose and, in fact, make a better wall and command a better price. Nevertheless, they remain common varieties of rock because their physical properties are not unique or rare. [Citations omitted.]

[3] As previously noted, common varieties of rock such as this were locatable prior to July 23, 1955, if they were then valuable for building purposes other than fill, ballast, sub-base, etc. However, claims located for common varieties before that date could not be validated by the discovery of special properties or the development of a qualifying market after that date, unless such properties were unique or so rare as to remove the material from its common variety classification. In short, a claim located for a common variety material had to be valid on July 23, 1955, in order to subsist beyond that date.

In this case, although the rock was tested as early as 1955 and as recently as 1971, and found to meet certain specifications, the major market into which the material was actually sold did not require much more by way of specifications than that there "be no sticks or

vegetative matter in or with it." Hard granite and decomposed granite are commonly found in the area. Parenthetically, we note that two previous Departmental decisions dealth with claims located on adjacent sections of land for the same materials used for essentially the same purposes. See United States v. Bedrock Mining Co., Inc., 1 IBLA 22 (1970); United States v. Duval, 65 I.D. 458 (1958).

In United States v. Osborne (Supp. on Judicial Remand), 28 IBLA 13, 25 (1976), we said:

> The sale of sand and gravel, rock or other material from a mining claim for use as fill material, or for such comparable purposes as sub-base, ballast or grade material, for which ordinary earth or rock could be used, cannot be considered in determining the marketability of the material on the claim. Such sales cannot be considered even if the material is suitable for other purposes which are cognizable under the mining law. [Citations omitted.]

Since much of the specification testing was not even performed until after the critical date, it is clear that the results were not known and cannot be credited to a "discovery" prior thereto. Where material claimed prior to July 23, 1955, is chiefly valuable as fill, a subsequent finding that it meets specifications for certain construction requirements does not validate the claim retroactively. United States v. Bienick, supra at 302; see United States v. Taylor, 19 IBLA 9, 45; 82 I.D. 68, 84 (1975) (concurring opinion).

[4] Appellant makes the argument that, in addition to its other asserted attributes, this deposit of rock is "close to the marketplace," which contributes to its value and tends to remove it from the status of a common variety. We have repeatedly held that a deposit of otherwise common sand, stone, clay, etc., cannot be regarded as an uncommon variety on the basis that the deposit enjoys an economic advantage due to its closer proximity to the market than other such deposits. Proximity is only an extrinsic factor which may influence the marketability of the material, but it does not distinguish the material from other such deposits in any of its inherent physical properties which lend it distinct or special value. United States v. Guzman, supra, 81 I.D. at 693, and cases therein cited.

[5] Finally, appellant contends that this proceeding is barred by estoppel and laches. It is alleged that the Forest Service made no objection to the location and development of the claims for approximately 10 years, and thereafter objected to further development of the claims and removal of rock therefrom, but it was not until 1972 that contest was finally initiated to determine the validity of the claims.

These circumstances do not describe a case in which the equitable defenses of either laches or estoppel can be properly invoked against the United States. The land in question was open to the location of mining claims, and common varieties of mineral materials, if qualifying, were subject to appropriation at that time. Consequently, Forest Service personnel had no mandate to interfere, object, or initiate a contest. They were justified in waiting to see what development was taking place, what material was being extracted, and how it was used. Such forbearance can give rise neither to estoppel nor laches. Moreover, acquiescence, laches, neglect of duty, delays, or failure to act on the part of Federal agents or officers does not deprive the United States from acting to enforce a public right or protect a public interest. 43 CFR 1810.3.

In Brattain Contractors, Inc., 37 IBLA 233 (1978), we noted that it has been estimated that more than 6,000,000 unpatented mining claims have been located on the public lands of the United States, exclusive of those in national forests. It would be an absurdity to place the onus on the United States to "promptly" determine the validity of all these claims or else be forever barred from defending its interests in those claims believed to be invalid.

In United States v. Zweifel, 11 IBLA 53, 98 (1973) we said, "Until mining claims are patented they are not immune from attack, and the Government, as holder of the legal title, may contest the validity at any time." (Citation omitted.) In affirming that decision sub nom. Roberts v. Morton, 549 F.2d 158, 163 (9th Cir. 1977), the Court of Appeals said:

> [9-11] We start with the general rule that ". . . the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights." United States v. Summerlin, 310 U.S. 414, 416, 60 S.Ct. 1019, 1020, 84 L.Ed. 1283; Board of Commissioners v. United States, 308 U.S. 343, 351, 60 S.Ct. 285, 84 L.Ed. 313. But even assuming some relaxation of these strict rules might be developing, there are no circumstances shown here to support the defense of laches. It is an affirmative defense requiring a showing of lack of diligence by a plaintiff and prejudice to the defendant. Costello v. United States, 365 U.S. 265, 282, 81 S.Ct. 534, 5 L.Ed.2d 551; Bradley v. Laird, 449 F.2d 898, 902 (10th Cir.). We cannot say the Government was precluded from asserting its rights here. See United States v. California, 332 U.S. 19, 39-40, 67 S.Ct. 1658, 91 L.Ed. 1889.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is hereby affirmed and adopted.

_____
Edward W. Stuebing
Administrative Judge

We concur:

_____
Newton Frishberg
Chief Administrative Judge

_____
Douglas E. Henriques
Administrative Judge

July 11, 1977

United States of America,	:	Contest No. CA-154
	:	
Contestant	:	Involving the Surprise lode
v.	:	No. 2, The Uno Mas, and Lotta
	:	Dirt placer mining claims,
Verdugo & Miller, Inc., a California Corporation,	:	situated in Secs. 33 and 34, T. 6 S., R. 6 W., and Secs. 3 and 4,
	:	T. 7 S., R. 6 W., S.B.M., Orange County, California
Contestee	:	

DECISION

Appearances: Charles F. Lawrence, Esq.
U. S. Department of Agriculture
For the Contestant.

Stephen C. Drummy, Esq.
Regan, Drummy, Garrett, and King, Inc.
For the Contestee.

Before: Administrative Law Judge Steiner.

This is an action brought by the Bureau of Land Management pursuant to the Hearings and Appeals Procedures of the Department of the Interior, 43 C.F.R. Part 4, to determine the validity of the above-named mining claims.

The Contestant filed a Complaint herein on February 16, 1973, alleging, inter alia, as follows:

> "A. There are not presently disclosed within the boundaries of the mining claims, nor were there disclosed from the dates of locations to the present, minerals of a variety subject to the mining laws, sufficient in quantity, quality and value to constitute a discovery, nor is such land chiefly valuable for building stone.

B. The land embraced within the claims is nonmineral in character."

The Contestee filed a timely Answer generally denying the foregoing allegations of the Complaint and alleging affirmatively that there has been a discovery of a valuable mineral deposit on each claim; that the Contestant, by reason of certain acts of its agents, is barred and estopped to deny the validity of the claims; and that the Contestant's right to relief is barred by the equitable doctrine of laches.

A hearing was held in Los Angeles, California.

John Verdugo, called as an adverse witness by the Contestant, testified that the Surprise lode and Surprise placer claims embrace the same lands. He was one of the original locators.

He obtained an excavating and grading job, referred to as the "El Toro" job in 1954. Material removed in the construction of an access road on the claims was used on the El Toro job, as well as on various other small jobs. (Tr. 44). The El Toro job was the major job of his firm, Verdugo and Haven, in 1955. Referring to excavating and grading jobs, he stated, "We had to import materials because once in a while on some of these jobs we get what we call soil that can't be used and rather than use it, we strip it and haul in decomposed granite which has got a high 'R' value and you have no problem getting your density." (Tr. 45).

The 548,000 square foot parking lot on the El Toro job was covered with four inches of asphalt underlain by fourteen inches of base material, one-third of which was decomposed granite removed from the western access road and from the Surprise claim which was overlapped by the Lotta Dirt claim. The decomposed granite taken from the claims was in a vein. A bulldozer and shovel were used to remove it. Only decomposed granite was used on the El Toro job.

Prior to July, 1955, rock was removed from the Uno Mas claim and taken to Emerald Bay for use in a seawall. (Tr. 58).

The rock that was mixed with the decomposed granite used on the El Toro job came from the Graham Brothers Plant in the Capistrano area, about twelve miles from the job, while the distance from the claims was twenty-two or twenty-three miles.

He stated, "* * * we done a test on the rock which came out good and everything but by that I mean we could sell this decomposed granite as the rock without having these special tests made here. In other words, lots of people didn't require that we show any tests on it." (Tr. 89).

With regard to the sales, he testified:

> "Q. So you made no special representations as to specifications?
>
> A. Nobody asked me.
>
> Q. And is it true that the purposes for which you sold it were for fill material?
>
> A. Yes.
>
> Q. On various projects?
>
> A. True.
>
> Q. And the rock was for rip-rap and revetments; is that correct?
>
> A. That's correct." (Tr. 89).

In 1955, he delivered an unknown quantity of material to the Morgan Paving Company, a paving contractor. It was used underneath slabs in the same manner as that used on the El Toro job. He delivered material to the Mansfield Rubber Plant in 1955.

He stated that he was not there to count every load in 1955 and could not state what amount of material was removed at that time. Three members of the Haven family were involved with the claims; two of them worked the claims, and the member who had made a record of production was never on the claims. (Tr. 95).

The contract pertaining to the Dana Point project was entered into in 1957. In 1955, he knew there was a ledge on the claims, but it was covered with overburden composed of decomposed granite and loose rock. The face of the ledge was not exposed sufficiently to quarry the rock until 1957. The face was not opened correctly, resulting in the production of smaller rock. "* * * if an experienced man would have opened that face up, we would have had everything we would have needed. They got themselves cornered in.." (Tr. 98). In order to meet the time element of the contract, they had to go elsewhere to get larger rock. Some of the rock material came from the Stringfellow claim.

No material was taken from the area of the claims before 1955. The El Toro contract was the largest he had for many years. There were others, not as big as El Toro, "but sufficient to keep us going." (Tr. 98). He supplied a list of the material removed to the county beginning in 1964. Those lists were made available to the Forest

Service. Decomposed granite was removed only from the Lotta Dirt and Surprise claims. (Tr. 99). He also stated that material was removed from the Uno Mas claim. (Tr. 101).

He had a contract with one Mr. Cochran, perhaps in 1968, for the removal of 30,000 tons of material. Cochran's mining equipment was not equipped with a spark arrester, and he was told to leave the claims by a Forest Service official. The contract was not consummated. He leased the pit to San Juan Environmental Quarries after 1970 and received royalties. He did not know of any records dated earlier than 1966.

Emmett Ball, after having been duly qualified as a mining engineer, testified that the claims are situated in the Cleveland National Forest, near San Juan Station, California. The claims were located in January, February, and March, 1955. He identified an aerial photograph portraying the claims, dated July 15, 1969 (Exhibit 9). He then identified five pages extracted from the El Toro contract which relate to the specifications for the decomposed surface course and the asphaltic concrete pavement. (Exhibit No. 14). He went to the El Toro Marine Corps Air Station and observed that a hole had been cut in the pavement revealing the material in it. "It was about three inches of A-C paving and about six inches, six or seven inches, of D.G. mixed with rock." He agreed with Mr. Verdugo's previous testimony that one-third of the material in the mixture of rock and D.G. was comprised of D.G.

On cross-examination, he stated that he first viewed the claims in 1967. He found two roads and evidence of excavation "on the west end" and on the Surprise claim. He saw no excavations on the Surprise No. 2. One road is on the Lotta Dirt claim on a 100-foot strip of land between the Forest boundary and the Surprise claim. With regard to excavations and removals on that road, he stated, "Well, there was a cut, not big, but they had cut through, so, I don't think they could have easily taken any out." (Tr. 116). He had never walked over all of each of the contested claims.

There was a face of some rock exposed on the Surprise claim. There were chunks of granite in the dump, probably up to a foot in size. The Corps of Engineers used caprock with a minimum size of two tons on the Dana Point project. He doubted if any rock of that size could be taken from the face on the Surprise claim. It was pretty well fractured. He stated:

> "I didn't think it was necessary to run tests on DG. I talked to several people to see what they were using it for. There wasn't anything that comprised a certain spec that I heard about, except that it had to be no sticks or vegetative matter in or with it. Recently, they've been

> using it for fill under pads, for drive-ways, houses and backfill in ditches where they put in pipe. For backfill in the ditches, they use DG to cut down the electrolysis when a pipe is clay material. They use this like sand except this is cheaper than sand." (Tr. 118).

He stated that the value of decomposed granite in place was three to five cents per yard in 1955. Granitic rocks cover quite a few square miles to the south of the claims. Decomposed granite occurs over a twenty square mile area and is used in a lot of places just for fill. The two rock types on the claims occur over three or four square miles. He stated that the rock and decomposed granite are as good as sand and gravel, "common variety". (Tr. 127).

Exhibit No. 13 contains a number of documents submitted to the Forest Service on January 22, 1973, to support the validity of the claims. Document BB is a schedule of prices submitted by contractor E. F. Grandy, dated November, 1954, listing 23 items. Items 22 and 23 relate to decomposed granite. It was his opinion that item 22 indicated the use of 822 cubic yards of decomposed gravel for surfacing. At five cents a yard, the value would be about forty dollars. Item 23 represents a six-inch layer mixed with rock. If four inches was composed of decomposed granite, the total would be 6,700 yards. If the layer was only one-third decomposed granite, the total would be somewhat less. The decomposed granite in item 22 was used for surfacing, a use higher than that of item 23. Many other materials could have been substituted for decomposed granite in item 23.

He did not see any excavations on the Uno Mas claim; if any material has been removed, it would be a very small amount. It was his opinion, based in part on Exhibit No. 9, that there was little or no material removed from the Surprise No. 2 claim prior to 1959.

He was on the road on the west side of the Lotta Dirt claim. There was a little pit on the west side, actually on the Surprise claim, from which one hundred to one thousand yards of material may have been removed as of 1967. Several thousand yards of material had been removed from the Surprise claim. In 1973, some of that material was used "down along the beach area for fill and sub-base material." (Tr. 137).

He based his testimony as to the material used on the El Toro job on the schedule of prices, Exhibit No. 13(BB). Asked whether he knew how much Verdugo and Haven received for the decomposed granite that they supplied to the El Toro Marine job, he stated:

> "No, I don't. I assume that it's part of the contract and it was their ground so

> they didn't receive anything for the material itself. It was just part of the price of the whole contract."

* * * * *

> "As part of this contract here for the El Toro Marine Base. They had to supply the material so they got it from their own property and they didn't pay anything for it." (Tr. 141).

He was in the business of buying material in 1955. He bought sand and gravel for two and one-half cents per yard near Victorville. That sand and gravel was higher grade than decomposed granite. It was washed and used for paving large areas of the air base at Adalanto. They used the sand and gravel in the concrete and in the asphalt. (Tr. 140).

There are large outcrops of granitic rock to the east of the claims which do not appear to be as fractured as the face of granitic rock on the Surprise claim. Any of the granitic rock in the area of the claims would qualify for caprock or core rock, except that the Corps of Engineers specified a minimum size. He did not think the minimum size required could be obtained from the contested claims. (Tr. 150).

He was accompanied on his first examination by Mr. Stevens, Mr. Miller, and Mr. Verdugo. They viewed two excavations exposing rock and decomposed granite on the Surprise claim. The exposed rock face would have produced small rock for rip-rap. Decomposed granite is not used as an aggregate in concrete. It may be used as subgrade and binder. Forty-five to fifty-five per cent of aggregate (crushed) rock should be added to the decomposed material. (Exhibit No. 13(P)). He stated that if you put decomposed granite under a slab for a house, you might not mix it with aggregate.

John Caragozian, Land Staff Officer, U. S. Forest Service, testified that he met with Mr. Verdugo on the claims on May 5, 1976, to discuss operation of the claims pending this contest. Mr. Verdugo identified an excavation thirty or forty feet wide and six or eight feet deep on the Lotta Dirt claim.

Norman Haven testified that he and Albert Boles staked out the subject claims in 1954. He was "more or less a field superintendent" for Verdugo and Haven on the El Toro job. He stated:

> "Yes, I was on the job and we used quite a bit of material for mixing with the crusher base and we also used the material right off the loading ramp areas on the three different pads, six inches of it,

> which they accepted for the job as a final material. In other words, this six-inch topping was compacted around all the loading areas, in all three areas." (Tr. 175-176).

He estimated that thirty to forty thousand cubic yards of decomposed granite was removed from the Surprise claim in early 1955 for the El Toro job. A road was built to the Lotta Dirt and Surprise claims. They abandoned a road leading to the Uno Mas claim from the Surprise because it was too steep.

County and state crews loaded decomposed granite off the shoulder of the road where he had opened a pit. They used the decomposed granite for maintenance work and for shoulders. "They had a pretty good face opened up before we did." (Tr. 178). There was a pit of decomposed granite at the El Toro location similar to the granite brought in from the claims, but it was limited and used for maintenance around the base.

The only place that decomposed granite was used exclusively was on the three loading ramp areas comprising approximately one acre of surface as shown in item 22 of Exhibit No. 13(BB). (Tr. 182-183). A lot of material used at El Toro came from the west side of the Surprise claim. It is possible that some came from the Lotta Dirt claim. "To open up roads, we used the material that we were using from the road to take as a base." (Tr. 193). He thought some of the material used for base came from the lower easterly excavation on the Surprise claim, but he was not positive. The eastern portion of the Surprise claim was opened up for a rock face in 1956.

Clyde Sweetser testified that he was acting Parks Superintendent in Laguna Beach in 1955. The City purchased granite rock from the John Verdugo pit on the Ortega Highway in the summer of 1955. He had been there prior to 1955. The rock was used in the Irving Bowl park site for construction of retaining walls around a restaurant. He took rock from a lower and upper ravine of a canyon. He did not know the sites by name. About five five-yard truckloads were removed each day for about two weeks. The rock did not meet any specifications. The fee was nominal, "something like ten dollars a load." (Tr. 206).

Exhibit B1 is a copy of a letter written by the witness to John Verdugo, dated March 16, 1967. It states:

> "In regard to your request for information regarding the number of times and dates the Park Division of the City of Laguna Beach went to your Ortega rock and decomposed granite pit, a check of our records indicates that we first went to the pit in the summer

> of 1955. Since that time the Parks Division, under your supervision, has made one or two trips a year to the site for granite rock and decomposed granite for Park development.
>
> We would like to continue our regular arrangement of sending City men and equipment for this material. We will have a need for granite rock later this year and would appreciate your contacting us as soon as you can make arrangements for us to remove the rock."

Exhibit B2 is a letter from the Director of Public Works to John Verdugo, dated November 14, 1967. It states, in part:

> "The test sample which was taken by the laboratory October 20th appears to meet the Standard Specifications of the State of California, Department of Public Works, Division of Highways (July 1964 Edition) for Class 3 aggregate base."

He stated that the City of Laguna Beach had not taken any material from the claims in the last five to nine years. The material did not have to meet any certain specifications for "what we were using it for." (Tr. 212).

On cross-examination, he stated that the city had removed about 100 yards of material, mostly decomposed granite, from the Surprise claim, as shown on Exhibit No. 9, in 1954. In 1955, the city removed about 250 yards of granite rock and decomposed granite. Four or five loads of material were removed each year in the ensuing years and used as a paved foot path in Heisler Park. It was spread on the ground and rolled with a roller to prevent erosion problems and dust. Rock from the claims was used as rip-rap in a retaining wall to hold dirt from sloughing into the picnic areas. The highest wall was four and one-half feet high, the other was much lower than that. Mortar was used in the rocks placed around the restaurant.

Ralph B. Haven, an operating engineer, testified that he opened the first road from the Ortega Highway to the claims early in 1955. He was looking for hard granite rock to be used in the harbor. He worked for Grandy on the El Toro job. About 30,000 yards of decomposed granite was used as subbase for the paving on the El Toro job. Within a year or two of 1955, about 75,000 yards of material was removed from the claim. Some of it was hauled off for various jobs. One Mr. Cochran went to the claim two or three times with a loader and some trucks and hauled the material away "for driveways and things." There was no material taken out when he first started to build the road. A canyon below the road was first

filled with rocks, the other material moved to construct the road was stockpiled. He stated that his 75,000 yard estimate of material removed was "a good guess." He confirmed that a three-inch layer of decomposed granite was spread under the parking lot on the El Toro job. He had seen the material used in driveways. "It's good material for a lot of things." (Tr. 234). He was not at the claims when the material was removed. Mr. Cochran removed decomposed granite mostly; he did not remember the exact years. His work on the claims, about twenty days, with a D-7 and another caterpillar, was about $160 per day.

Robert Olsen testified that he was employed by the Orange County Harbor District in July, 1955. In 1957, a rock dike (not a breakwater project) was constructed at Dana Cove to protect the parking lot. (Tr. 238). The District entered into a contract with Verdugo and Haven, Inc. on December 11, 1956 (Exhibit C), to furnish and place approximately 6,500 tons of anchor caprock on 620 lineal feet of fill at Dana Point. The contractor was to include all of the work materials, transportation, and services called for in the plans and specifications. A proposal dated December 10, 1956, provided that Verdugo and Haven were to be paid twenty-five cents per ton for the rock used from their quarry.

Exhibit D is comprised of copies of five pages of the minutes of the Orange County Harbor Commission, dated December 10, 1956, January 16, March 11, and April 8, 1957, all referring to the contract with Verdugo and Haven for furnishing and placing anchor caprock on the dike at Dana Point Cove. There were two other bidders, one who bid $5.70 per ton in place, and the second, who bid $5.95 per ton in place. The minutes indicate that Verdugo and Haven submitted a bid to work on a cost plus 10% basis, with a maximum cost of $5.00 per ton in place. The total approximate cost was $32,500.00 for about 6,500 tons. The Board extended the time for delivery and placement of the caprock until June 16, 1957.

Exhibit E includes reports of tests of the subject rock dated April 10, 1956, and March 25, 1957, and a letter dated October 24, 1967, written by the Harbor Engineer of the Orange County Harbor District. The letter indicates that the subject rock passes the specifications for specific gravity, sodium sulphate soundings, and abrasion for the Dana Point project. The letter also states:

> "One of the District's engineers does recall that the contractor was requested to use another source of material for completion of the contract because of delays encountered in getting enough large size cap rock to meet the construction schedule. Our engineer was of the opinion the quarry could have produced the large sizes of rock if the quarry operations had been handled differently."

He had been to the quarry about two or three times in 1957. He stated that the rock used averaged 25 to 30 pounds to five tons. There were not many five-ton rocks, but most of them were about three tons. It was his opinion that the Verdugo quarry rock was "as good as" other available quarry rock used on harbor projects.
On cross-examination, he stated that, in 1967, the main breakwater at Dana Point Harbor was constructed by the Corps of Engineers. The rock for that project, about one-half million tons, came from the Carlsbad Quarry or from Vista. The market for capstone-type rock is very spotty. As to quality, the rock on the subject claims is similar to the other quarries which he referred to except that some may be a little heavier. About two or three tons of caprock was brought in from Riverside to complete the Dana Point project. About 4,000 to 4,500 tons of caprock came from the Verdugo claims.

Robert Brazil, Chief Construction Inspector of the Orange County Flood Control District, testified that a considerable amount of quarry rock, armor rock, or rip-rap has been used for levee protection. The rock should be angular and three inches to a foot-and-a-half in diameter. The rocks should average about forty to one hundred pounds. It is used in flood control channels on the sides of levee slopes. About four or five million dollars worth of rock has been used intermittently in the late 1950's, 60's, and early 70's. In the late 1950's, a project at the mouth of the Santa Ana River utilized considerable rock, some derrick rock weighing five tons. That rock and rock used in the late 1960's came from the Riverside-Corona areas.

He inspected the rock at the Verdugo Quarry one year prior to the hearing. It was a good quality rock meeting the Orange County Environmental Agency specifications for filter rock and facing stone. (Exhibit F). There is a continuing demand for this type of quarry rock on Public Works projects in the Orange County area. He knew of no imminent projects, but there may be work coming along in a few years. The rock face at the Verdugo quarry had a maximum height of twenty-five feet. He knew of no imminent flood control projects which would require quarry rock.

William Rex Hoover testified that he had been treasurer of Verdugo and Haven, Inc., and identified a progressive accumulation of costs for each individual job, Exhibit 13, W, X, Y, Z, and AA. He stated that Exhibit 13CC, an "Analysis of Schedule of Prices As Relate to El Toro Job", shows a conservative net profit of $3,913.16. The analysis was prepared by Lee Haven who was superintendent at the pit. He described Mr. Haven as a construction man, capable of compiling costs on his own work. He stated that continued efforts were made to sell decomposed granite, "* * * until they were incapacitated as a result of this on the quarry, which was a financial disaster." "Well, the cost of operation in the pit was beyond their return, consequently, they had to go out and buy rock from another

source and then finish their –". (Tr. 311). Operations ceased in the latter part of 1957, 1958. Verdugo and Haven ceased operating, and Mr. Verdugo and the witness took the claims and continued to do the improvement work for a great many years. During this time, they had small jobs, 25 to 100 tons, on parking lots and things of that kind where they needed material that would compact easily. They had about eight or ten jobs a year, but this was not enough for a commercial operation. (Tr. 312). Very little was done for a period of about twelve years.

In May, 1967, the Verdugo firm had to buy $15,610.94 worth of rock from the Stringfellow quarry to finish the Dana Point job. There are no suppliers of armor or quarry rock in the area. He stated:

> "* * * but there is probably some in river beds that would produce as good, as a by-product of rock and sand. I don't know whether the current operation up there on the Ortega has produced any of that kind of rock, or not, but it would be a small rip-rap if they did have any. There's nothing of any quarry kind." (Tr. 314).

Bernard Syfan; a civil engineer and contractor, testified that, in 1961, material from the Verdugo pit was used as a sub-base for the building slab of the Bank of America in Laguna Beach and for the parking lot and for the construction of the Laguna Federal Savings and Loan. Prior to 1961, small amounts of decomposed granite from the Verdugo pit was used for walks and driveways in Emerald Bay. The decomposed granite had to meet certain requirements on the bank jobs. The material passed the requirements. "It's a good sub-base material." It is better than sands available and being used presently in Laguna. The demand for decomposed gravel has been increasing daily since the mid-1950's. He did not recall having purchased any material from the Verdugo pit. He had used quarry rock on a number of occasions for the control of erosion and sanding bottoms along the waterfront. He described rip-rap as smaller sizes of rock, as big as your fist. With respect to Mr. Verdugo's reputation in the Laguna Beach area, he stated:

> "He's an excellent dirt man. He's been an equipment operator; he's been furnishing material for me; he's done work for me off and on over the years and he's always been good." (Tr. 320).

On cross-examination, he stated that he prefers to use decomposed granite, but right now, it is not as economically available as less valuable sand. He stated that decomposed granite is not used a great deal for the direct sub-surface on the highway or public road. "It is used for a sub-base quite often. If you're in a bad area, that is." "A layer underneath

the base in a very high, high use area, such as, driveways, parking lots or other infrequent use area, it's a very common material, if it's available in the area and if it's not, it's not used." (Tr. 322).

The Bank of America building in Laguna Beach was supported by pilings. The slab was supported by seven or eight hundred tons of decomposed granite. About eight hundred tons of decomposed granite was used on the Laguna Federal Savings lot but not inside the building. He tried to buy more decomposed granite in late 1961 or 1962, but the Verdugo pit was not operating. In 1972, he asked for material, and it was not available. (Tr. 326). Comparing the price of decomposed granite with sand, he stated, "At the time we used it, it was the least expensive way to go and that's why we went that way."

Allen Clark, a land surveyor and mining engineer, testified that in 1970 he prepared Exhibit A, which is a map of the contested claims. The map was compiled primarily from the information set forth on the location notices. He did not perform a ground survey on each claim but had been over the claim area. He had prepared a report dated August 12, 1970 (Exhibit H), which provides, in part, as follows:

> "The claims consist almost in their entirety of Granite, Granodiorite, and Andesite, in various stages of weathering and decomposition, ranging from massive block structure down to fine sands. The formation appears to be near the Westerly limits of the Elsinore batholith, and may be described as a coarse, light gray rock which through weathering develops abundant boulders, gravels and sands. The formation is partially overlain by less than a foot of red-brown sandy clay, supporting some vegetation, this overburden may be utilized by mixing with the sandy gravel to increase the compaction qualities and density for road base materials.
>
> The granites when excavated, depending upon size, are well suited for use as sand, gravel, road-base material, concrete aggregate, riprap, building stone, and as large blocks for the construction of harbors and breakwaters (materials for the latter uses must now be imported from outside Orange County). It is not necessary to utilize water to blend or classify any of these products.

> At the present time there is an Open-Pit operation on the site that has been worked since early 1955. About 100,000 tons of material has been removed or stock piled from this pit, and has been or will be used for the above mentioned purposes. Two access roads now service the property, the Westerly one, which runs North-South, will be the future location of the Office area and the Scales. The middle road which leads to the Pit and the future Crusher location and Storage area, as shown on the plan, will be connected to the Westerly road at a later date. There is also a permit for a third road that will be constructed in the future to service the Easterly portion of the claims.
>
> The volume of useable material if excavated to a depth of 150 feet on each claim would be 150' x 600' x 1500' = 135,000,000 cu ft., or 5,000,000 cu yds., using a factor of 2.2 tons per cu yd. this will yield 11,000,000 tons per full size claim, thus for 3.2 claims there exists 35,200,000 tons of useable material with little or no waste.
>
> The plan of the proposed operation for the next 20 years is to enlarge the present Pit within the limits of the 'Surprise' claim, however there will be established a 200 foot wide Buffer-Zone immediately adjacent to and measured from the centerline of the Ortega Highway, as shown on the plan, in which there will be no Pit operation. The equipment necessary for the proposed operation will be 1 shovel (2 yd.), 1 Bull-Dozer (D-8), 1 rubber tire Loader (1.5 ton), a portable scale, a portable Crusher, and portable Office and Equipment storage buildings. At a capacity of 1,000 tons per day, this operation will yield about 250,000 tons of sand and gravel and rock per year, which will be 5,000,000 tons of material in 20 years."

It was his opinion that the face in the large pit would produce three to five ton rock. It was his opinion that the decomposed granite included in item 22 of Exhibit No. 13(BB), after reducing the hauling costs, had a value of about one dollar per yard. The value of the decomposed granite

included in item 23 was $1.25 per yard. (Exhibit I). On cross-examination, he conceded that these were gross values from which some costs, other than hauling, could be deducted.

Exhibit J is comprised of ten pages of material from the official records of Orange County relating to Conditional Permit Application No. C-444 filed by Albert Boles in March, 1955. The permit was for a decomposed granite and wall-rock quarry. The permit was granted on April 5, 1955. The Applicant, Albert Boles, stated in the application:

> "This material decomposed granite - is
> needed for driveways and parking areas,
> also highway sub-base material."
>
> * * * * *
>
> "The hard granite is particularly valu-
> able in seawall construction."

Fred Cooper Pratley, an engineering geologist consultant, described armor rock, caprock, or rip-rap as a protective covering composed of crystalline rock, angular rock, to prevent erosion. Caprock can be other igneous rock. Some limestones and corals are used. The rock on the Verdugo claim meets the specifications for armor rock. He believed that the face on the Surprise claim would yield some rocks as much as six feet in diameter and weighing over twelve tons as the face is driven into the mountain.

On cross-examination, he reviewed Exhibit No. 11, a copy of a map appearing in a publication of the Department of Natural Resources. The title of the book is Crystalline Rocks of Southwestern California, Bulletin 159 (Dated 1951). The exhibit shows the occurrence of many square miles of granitic rocks in this area. He would not expect to find significant differences between the granitic rocks indicated on the exhibit and those found on the contested claims. He indicated that there was "a whole forest" of rock that could serve as armor rock. (Tr. 371). The rock exposed at the surface of the face on the claim would yield pieces as large as two or three feet in diameter.

Peter Allen Lemas, an accountant, testified that he wrote a letter dated January 18, 1973, Exhibit L, to prove that the Verdugo pit was operating prior to 1955. The figures in the letter were obtained from his analysis of the cost records of Verdugo and Haven, Inc. On cross-examination, he indicated that the material comprising Exhibit G, which was the basis of his letter, included other jobs having no relationship to activities on the Surprise claim.

Dave Haas, a licensed contractor, is the owner of San Juan Environmental Quarries. His firm entered into an agreement with Verdugo and Miller, Inc., on February 8, 1972 (Exhibit M), providing San Juan with the right to quarry, mine, and sell material of whatever nature from the contested

claims. (The agreement does not distinguish decomposed granite from granite rock material.) The agreement provides for the payment of royalties of 10 cents per ton for the first 6,000 tons, or 15 cents per yard for the first 4,000, and 12 cents per ton for all over 6,000 tons for all material used in any calendar month. He stated that the agreement concerns the sale and quarry operation of large rip-rap and breakwater rock. There was a great demand for large rock. The crushed granite mixed together makes a class 1 base for highways and freeways. The U.S. Forest Service "has other areas within the Cleveland National Forest that would be acceptable, however, the access makes it very, very difficult and practically unprofitable to be taken out." (Tr. 398). He sold decomposed granite from the claims at a profit shortly after 1972. He sold 10,000 to 12,000 yards of material to Shupe Trucking and H & H Trucking, who, in turn, resold it to customers in southern Orange County.

More than $5,000.00 worth of material was sold to Kennedy Pipeline. He stated:

> "The material is very good in the sense that you can backfill trenches and areas that will not accept the natural material and extraction from the trenches. For instance, waterlines, sewer lines. If there's a great deal of material, rocky material, that's been excavated in the operation of installing these lines, then the material has to be replaced and this material compacts very well and causes good bind and strength. With a minimum amount of effort to recompact the area, that is." (Tr. 401).

He sold some granite rock to Mulkraft Construction company working at Dana Point Harbor. The rock was placed around Dana's monument. He had many requests for rip-rap and armor rock from Orange County. It was his opinion that the cost of opening up the quarry would be about $100,000.00. His company paid Verdugo and Miller about $6,000.00 in royalties while operating the quarry.

He described first class base, or class 1 aggregate, as an angular sand or decomposed granite, plus an additive of three-quarters to an inch rock in an angular basis, mixed together. Second class is round sand or rock derived from river beds. Decomposed granite, in its natural state, is a third class base. Mixed properly with angular crushed rock, it would be in the first class category. He stated:

> "* * * I don't see any operation in any parts of the Cleveland National Forest that I've looked at that would be profitable to set it up in one year's time. The

> particular area that we're discussing would take approximately three years to put it on a paying basis and I feel that the original operations that were started in there in 1955 were started wrong. I feel that to open that thing up, you'd have to start a face in the big rock which is the real item in the quarry. You'd have to take about three years to put it on a paying basis. It's a great deal of expense." (Tr. 415).

* * * * *

> "Well, it was started by -- It has more or less worked into a corner. You have two corners and it's worked into a 'V' and in order to blast properly and work it, you have to straighten it out. You have to straighten it out and get a good wide face, working room. There's very little working room in the area at the time." (Tr. 416).

On cross-examination, he stated that his firm had removed about 2,000 yards of decomposed gravel and $2,000.00 worth of rock since the contract was made. The decomposed granite was used for parking lots, backfill of trenches, and stipend material. The buyers paid seventy cents per yard, FOB the pit. The buyers required that the decomposed granite "have a sand equivalent, in most cases, of 25." (Tr. 420).

Clifford Stevens, District Ranger of the Cleveland National Forest, was called as a witness for the Contestee. He identified a letter dated July 28, 1955 (Exhibit O), written to the Regional Forester by D. S. Kaplan, Attorney in Charge, U.S. Department of Agriculture, relating to the subject claims. It reads, in part, as follows:

> "The claims are stated to be for decomposed granite and building stone, but only decomposed granite is now being removed. The present operation is unquestionably profitable. The claimants operate a construction firm and are presently using the material in connection with an airport contract. From their standpoint the operation amounts to obtaining free fill."

* * * * *

> "Mr. Sanborn advises that, from an engineering standpoint, there is a distinct difference between the material on this claim and that involved in any previous Interior Decision. He feels that decomposed granite is not really sand at all and that the claimants are simply removing part of the country-side and using it for fill."

On 15 or 20 occasions, he had advised individuals at the Surprise claim that further mining activity was believed to be unauthorized. He tried to keep people from taking materials off of the claims beginning in 1968 and on three or four occasions before that.

John Verdugo testified that he holds a general engineering license authorizing him to do contract work on dams, bridges, waterways, and pipelines. For thirty years he has been licensed to do excavating, grading, and paving. His business "includes moving masses of earth, rock or whatever and buildings, subdivisions, roadways." (Tr. 503). Since 1945, he was looking for deposits of decomposed granite and building stone, wallstone, rip-rap, and breakwater stone. He hired Mr. Boles to locate the subject claims. At that time, the Verdugo and Haven firm was basically in the grading contracting business.

When the access road was built into the claims, he supplied the material to the operation at El Toro, the Grandy job, and several other projects. Forty to fifty thousand tons of material was sold in 1955. In 1965, he agreed to allow another excavator and grader, Ray Cochran, to remove about 30,000 yards of material from the claims for a royalty of ten cents a yard. Cochran's equipment did not have a spark arrester. Clifford Stevens advised Cochran "that removal of the earth material constituted trespassing of Government property and removal of Government property." "So that pretty well scared Mr. Cochran down." (Tr. 510). Stanley Allen and others paid him $2,000.00 to remove material from the claim in 1970, but they did not remove any material.

In 1964 or 1965, material was required to improve "this San Juan ground". Clifford Stevens stated that the Surprise claim was not a legal valid claim. "Later then it was designated to widen the road across from the entrance. He got the surplus dirt from there, for the project." (Tr. 517). The U.S. Forest Service was aware of the fact that he had been removing material from the pit.

One of his employees, Lee Haven, was put in charge of mining the rock. He was inexperienced, having no knowledge of quarry rock work. "* * * he got himself dug into a little hole that kept getting smaller and smaller. Instead of getting a big face, like a quarry should have, he –". (Tr. 522). After about fifty per cent of the rock had been furnished at Dana Point,

he was requested to obtain rock from other sources to finish the job. The rock was purchased from Stringfellow at additional cost. This was the financial disaster referred to by Mr. Hoover. He stated:

> "* * * I don't think that expenditure was completely lost because the rock was uncovered. It was there. Had it been done right, it would be in operation today."

* * * * *

> "So, the whole expenditure was not a disaster. I would say that we could be charged to some exploration and experience." (Tr. 523-524).

On cross-examination, he stated that he had no written contracts of sales between 1955 and 1965, except the El Toro job, but he did sell a lot of material. The City of Laguna Beach paid him for the material which it removed, but he could not recall how much he was paid. In 1970, he delivered some decomposed granite to a school for five dollars per yard.

Under the mining laws of the United States (30 U.S.C. § 22 et seq. (1970)) a valid location of a mining claim requires discovery of a valuable mineral deposit within the limits of the claim. The rule as to what constitutes a valid discovery has been stated as follows:

> "* * * Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a a valuable mine, the requirements of the statute have been met. * * *." Castle v. Womble, 19 L.D. 455, 457 (1894); United States v. Coleman, 390 U.S. 559 (1968).

This test (the prudent man rule) has been refined to require a showing that the mineral in question can be extracted, removed, and presently marketed at a profit, the so-called marketability test. United States v. Coleman, supra. This present marketability can be demonstrated by a favorable showing as to such factors as the accessibility of the deposit, bona fides in development, proximity to market, and the existence of a present demand.

The sale of sand and gravel, rock or other material from a mining claim for use as fill material, or for such comparable purposes as sub-base, ballast or grade material, for which ordinary earth or rock could be

used, cannot be considered in determining the marketability of the material on the claim. Such sales cannot be considered even if the material is suitable for other purposes which are cognizable under the mining law. United States v. Baker, 23 IBLA 319 (1976); United States v. Bienick, 14 IBLA 290 (1974); United States v. Harenberg, 11 IBLA 153 (1973); United States v. Barrows, 76 I.D. 299 (1969); aff'd., Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971); United States v. Hinde, A-30634 (July 9, 1968); United States v. Brewer, A-27908 (December 29, 1959); United States v. Proctor, A-27899 (May 4, 1959); United States v. Black, 64 I.D. 93 (1957); Holman v. State of Utah, 41 L.D. 314 (1912).

Material which is used for fill purposes, road base or sub-base, on driveways, or comparable uses is not locatable under the mining laws. (United States v. Bienick, supra).

The ultimate burden of proving discovery is always upon the mining claimant. United States v. Springer, 491 F.2d 239 (9th Cir.), cert. denied, 419 U.S. 234 (1974).

The Act of July 23, 1955, 30 U.S.C. § 611 (1970), removed common varieties of materials from location under the mining laws. Thus, it is incumbent upon one who located a claim prior to that date for a common variety of materials to show that all the requirements for a discovery, including a showing that the materials could have been extracted, removed, and marketed at a profit, had been met by that date. Multiple Use, Inc. v. Morton, 504 F.2d 448 (9th Cir. 1974); Barrows v. Hickel, supra; Palmer v. Dredge Corp., 398 F.2d 791 (9th Cir. 1968).

The Interior Board of Land Appeals has considered the validity of claims bearing massive outcroppings of granite valuable for building stone in breakwaters, backfill, and other commercial uses. Two of those cases, United States v. Laura Duvall and Clifford F. Russell, 65 I.D. 458 (1958), and United States v. Bedrock Mining Co., 1 IBLA 21 (1970), involved deposits situated within one or two miles of the subject claims. The claims involved in those cases were located after July, 1955. In each case, the Board held that the granite deposits were a common variety within the meaning of the Act of July 23, 1955, supra.

The Supreme Court has ruled (United States v. Coleman, supra) that the Act of July 23, 1955, supra, eliminating as minerals locatable under the mining laws a "deposit of common varieties of sand, stone, gravel, pumice, pumicite or cinders", applies to common varieties of building stone, but that the Act of August 4, 1892, 27 Stat. 348, 30 U.S.C. § 161, authorizing mining locations of lands chiefly valuable for building stone, remains viable and "effective as to building stone that has 'some property giving it distinct and special value'." United States v. Coleman, supra at 605.

It is clear from Contestant's Exhibit No. 11, a [color-coded geologic map, and the testimony of witnesses for both parties, that massive deposits of granodiorites occur over widespread areas in the vicinity of the claims. The contestee relies on two granitic materials to support his discovery, decomposed granite and granite rock, both of widespread occurrence in the Cleveland National Forest.

The decomposed granite was used for fill, road base, sub-base, crusher base, surfacing of driveways, backfill in ditches, the maintenance of shoulders on highways, foot paths, and comparable uses. The decomposed granite is not locatable under the mining laws, and its sale for the foregoing uses may not be used to establish its marketability for higher uses. Since the decomposed granite was not subject to location under the mining laws, the validity of the claims rests upon the discovery of the granite rock.

Where a large quantity of similar stone is available from other deposits in the same general market area, the stone is not unique and therefore does not have a distinct and special value. United States v. Coleman, supra; Brubaker v. Morton, 500 F.2d 200 (9th Cir. 1974); Boyle v. Morton, 519 F.2d 551 (9th Cir. 1975). The Court, in McClarty v. Secretary of the Interior, et al., 408 F.2d 907 (9th Cir. 1969), approved the following guidelines to determine whether a stone has some unique feature to distinguish it from otherwise common varieties of stone:

> "(1) [T]here must be a comparison of the mineral deposit in question with other deposits of such minerals generally; (2) the mineral deposit in question must have a unique property; (3) the unique property must give the deposit a distinct and special value; (4) if the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use; and (5) the distinct and special value must be reflected by the higher price which the material commands in the market place."

According to Norman Haven's testimony, the main rock face on the eastern portion of the Surprise claim was not opened up until 1956. There is insufficient evidence in the record of any significant market for, or sales of, the granite stone deposited on the claims to support a conclusion that the stone was marketable prior to July 23, 1955. In order to sustain the validity of the claims, therefore, it must be established that the granite rock is presently marketable, and is not a common variety of mineral within the meaning of the Act of July 23, 1955, supra.

Applying the guidelines approved by the Court in the McClarty case, supra, I conclude that the granite rock is a "common variety", within the meaning of the Act of July 23, 1955, supra.

The granite rock does meet the specifications for armor and quarry rock, however, one would not reasonably expect to find significant differences between the subject granite rock deposits and adjacent granitic rock deposits. Other igneous rocks, limestones, and corals, as well as rock removed from river beds as a by-product of the production of sand and gravel, may also be used for armor rock or quarry rock. The granite rock does not appear to have any distinct or special value for use as armor rock.

Submitted as unique properties of the subject granite rock are its high specific gravity, its high resistance to abrasion, its chemical composition reflected in its favorable sodium sulphate soundings test, and the indication that it may be recovered in rocks weighing up to six tons.

The Contestee has failed to establish that sufficient quantities of large quarry rock occur on the claims. According to its own witnesses, it was able to supply only about one-half of the armor rock required by the contract for the Dana Point rock dike, despite the fact that it had its own captive rock deposit on the Surprise claim. Forced to purchase more than fifteen thousand dollars worth of rock from another source to meet its contract commitments, the firm incurred unspecified losses on the project. In 1976, twenty years after location, the exposed rock face on the Surprise claim would yield only small rip-rap, not large quarry rock. The present cost of enlarging the rock face to produce large quarry rock (if large quarry rock does occur beneath the surface) would be about $100,000.00.

The Contestee has failed to establish that the alleged unique properties impart any distinct and special value to the granite rock. There is no probative evidence in the record to prove that the subject granite rock commands a higher price in the market place than rock from competing suppliers. On the contrary, the Contestee submitted the lowest bid on the Dana Point rock dike. As the successful bidder, it did not make a profit, even though its bid was only seventy cents per ton less than the next higher bid.

Since the subject granite rock is a "common variety", not subject to location after July 23, 1955, and since the Contestee has failed to prove that the granitic rock, as distinguished from the decomposed granite, was marketable for uses other than fill, sub-base, or comparable uses, prior to July 23, 1955, the rock does not constitute a valuable mineral deposit.

The affirmative defenses set forth in the Contestee's Answer appear to be without merit.

For the reasons stated above, the subject placer mining claims and lode mining claim are hereby declared null and void.

R. M. Steiner
Administrative Law Judge

Enclosure: Information Pertaining to Appeal Procedures

Distribution:
Stephen C. Drummy, Esq., Regan, Drummy, Garrett, and King, Inc., P.O. Box 8010, Suite 205, Macarthur Plaza, 4299 Macarthur Blvd., Newport Beach, California 92663 (Cert.)
Charles F. Lawrence, Esq., Office of the General Counsel, U.S. Department of Agriculture, Two Embarcadero Center, Suite 860, San Francisco, California 94111 (Cert.)

Standard Distribution